Docket No. 2023-3

Internet Archive's Reply Comments on the Proposed Rulemaking Concerning Access to Electronic Works

These comments are provided on behalf of the Internet Archive, a 501(c)(3) non-profit library. Like other libraries, Internet Archive works to expand access to knowledge by collecting, preserving, and providing public access to a variety of physical and digital materials. The Internet Archive is based in San Francisco, California, but most of our patrons visit our collections online at archive.org.[1]

Internet Archive strongly supports the proposed rule to expand the types of electronic deposits of published works that the Library of Congress can select for its collection. As more and more of our cultural heritage is created in electronic format, it is essential that our national library be empowered to select such materials for long term preservation and access. Without rule changes like this one, the public will have increasingly less access to these kinds of works, and the library system risks being left behind in the digital transition.

We note that comments filed by the AAP, Authors Guild, RIAA, and Copyright Alliance suggest that any and all access to LoC's collections requires participation in a licensing regime of their choosing. This is not the law. To be sure, IT security is of the utmost importance. But the Copyright Act has always allowed libraries to preserve and provide access to works in their collection without permission or authorization from rightsholders.[2] It is only the publishers, in furtherance of their own pecuniary interests, who suggest that collecting and preserving digital material requires a different set of rules from those applied in everyday library practice. This is unsupported by law or policy.

Library of Congress does not need "bespoke terms and conditions" from rightsholders to fulfill its basic purpose. Placement in the LoC's collections does not "devalue" industry copyrights. The Library of Congress is a national treasure. Selection for inclusion in the

[1] Archive.org is one of the world's most visited websites. *See, e.g.,* https://moz.com/top500.

[2] Courtney, Kyle K., *Libraries Do Not Need Permission To Lend Books: Fair Use, First Sale, and the Fallacy of Licensing Culture* (May 18, 2020). Available at: https://kylecourtney.com/2020/05/18/libraries-do-not-need-permission-fair-use-first-sale-and-the-fallacy-of-permission-culture/

LoC collection is an honor and ensures long-term preservation of important works. Regrettably, many industry voices can only see in this a commercial licensing "opportunity." But the Library of Congress, and the various legal mechanisms for adding to its collections, were specifically constructed to stand apart from the financial interests of industry. That is just as true in the digital realm as it is in the physical.

The industry discussion of sections 408 and 109 gets things backwards. Congress has never required the Library of Congress, or any other library, to pay licensing fees to preserve or lend items in their collections. Despite the best efforts of industry to import a "public lending right" system from Europe to the United States, Congress has considered and rejected those efforts. In any case, neither Section 408 nor Section 109 need "authorize" the Library of Congress to manage its own collections. And despite industries attempts to construct a theory of harm, they ultimately acknowledge that they are not entitled to "judicial review and remedies" for these hypothetical harms–which amount to little more than having to "choose between being exposed to these risks or foregoing the convenience of submitting digital deposits with their copyright registration applications (or perhaps choosing not to register at all)."

For all of the above reasons, the proposed rule should be adopted without further delay.